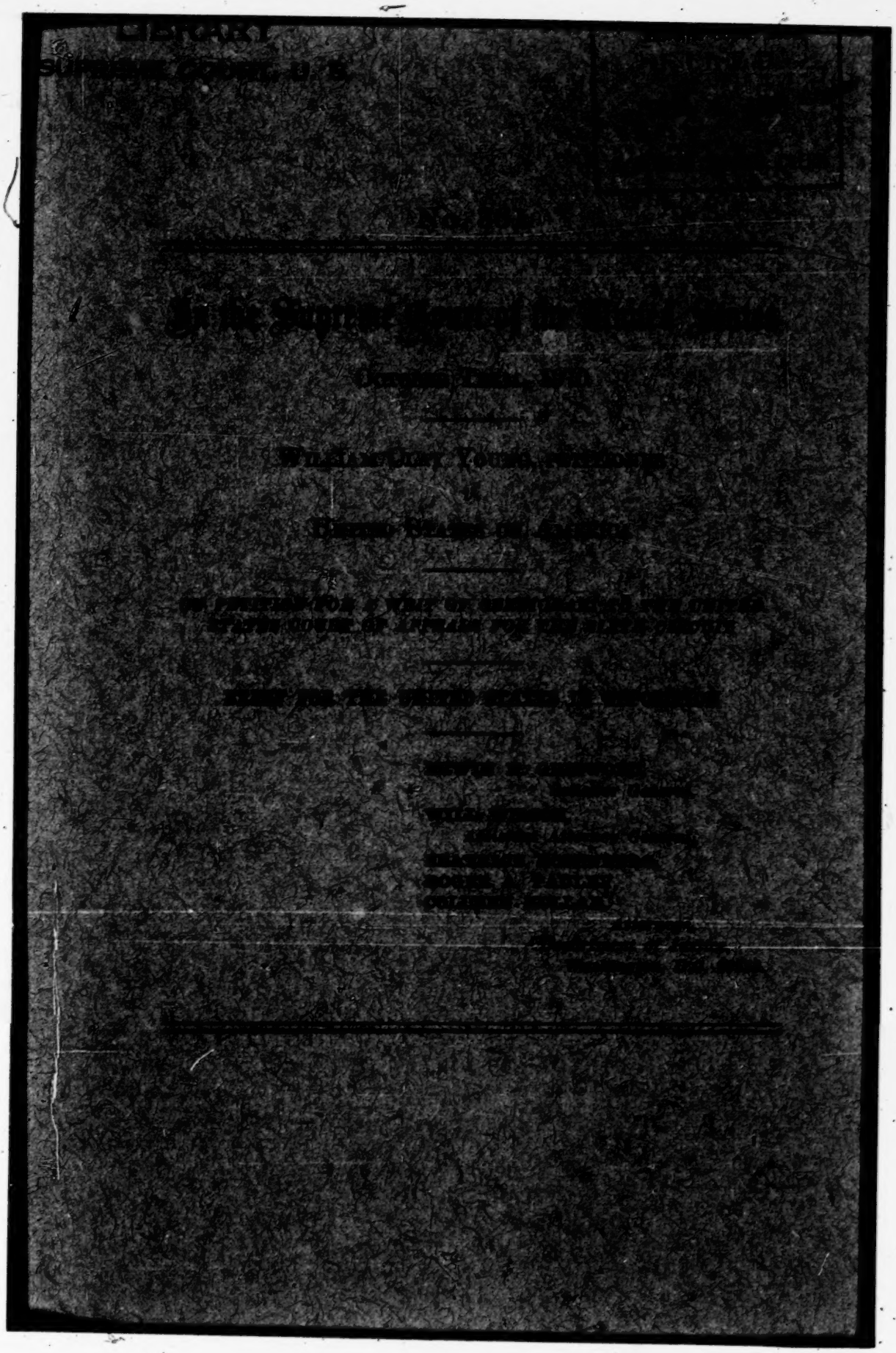

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 361

WILLIAM CLAY YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 426 F. 2d 93.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1970, and a petition for rehearing was denied on June 8, 1970. On July 6, 1970, the petition for a writ of certiorari was filed. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge properly denied petitioner's motion for a new trial on the grounds that new evi-

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dence favorable to the defense had been discovered which the prosecutor had concealed at the trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of four counts charging violations of federal liquor laws.[1] He was sentenced in April 1969 to imprisonment for two years on Counts 1 and 2, eighteen months on Count 3 and one year on Count 4, the sentences to run concurrently. The court of appeals affirmed the convictions (Pet. App. A, 1-6).

1. At trial, the government's chief witness was Robert Lee Corbin, an undercover agent with the Alcohol and Tobacco Tax Division of the Internal Revenue Service. He testified that on April 14, 1965, he persuaded one "Digger" Poindexter to take him to petitioner's house to purchase non-tax-paid liquor. Corbin bought a pint of illegal whiskey from petitioner (Tr. 38-39). Agent Corbin also testified that he returned to petitioner's home on April 21, 1965, without Poindexter, bought another pint of illegal whiskey (Tr. 41-43; 69-70), and paid petitioner in advance to deliver sixty gallons of illegal whiskey

[1] Two counts charged petitioner with carrying on the business of a retail dealer in liquor without paying federal taxes, in violation of 26 U.S.C. 5691(a), one count charged possession of non-tax-paid distilled spirits in violation of 26 U.S.C. 5601, and one count charged possession of an automobile intended for use in the transportation of distilled spirits without the payment of taxes.

"Tr." refers to the trial transcript and "H." refers to the transcript of the hearing on the motion for a new trial.

to him the following morning (Tr. 42–44). While in the process of hauling the illegal whiskey by automobile, petitioner was spotted by Corbin and three other agents. A search of the trunk of petitioner's car uncovered 20 gallons of illegal whiskey (Tr. 45–46; 71–72; 74–77; 87–91).

Petitioner testified that Corbin was taken to his house on April 14, 1965, not by Poindexter, but by one Harold Key and that they had brought their own illegal whiskey with them and had offered him a drink (Tr. 107–110). Petitioner testified further that at this time and on later occasions Corbin tried to induce petitioner to manufacture illegal whiskey for him (Tr. 112). He declined the offer several times, but finally agreed as a favor to haul some whiskey for Corbin, since he was going in that direction to purchase some tractor parts (Tr. 112–114). Neither "Digger" Poindexter nor Harold Key was called as a witness.

2. One month after his conviction, petitioner filed a motion for a new trial, charging essentially that the government had suppressed material evidence in the case by not calling "Digger" Poindexter and Harold Key as witnesses. The motion also alleged surprise from the testimony of agent Corbin because he had named Poindexter and not Key as the person who had accompanied him to petitioner's house. In support of his motion, petitioner furnished affidavits executed by Poindexter and Key. Poindexter recited

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[1] Willy Sirey, who was allegedly doing repair work in petitioner's home on April 14, 1965, corroborated petitioner's claim that Harold Key had accompanied Corbin (Tr. 143–148).

that he was not acquainted with Corbin and thus could not have accompanied him to petitioner's house; Key recalled being with Corbin at petitioner's house on the occasion when, as petitioner had testified, Corbin attempted to induce petitioner to engage in the illicit liquor business. Petitioner alleged that the affidavits constituted newly discovered evidence.

At the hearing on the motion, held in July 1969, only Key testified, although both Key and Poindexter had been subpoenaed. Despite the specificity of his affidavit, Key stated at this time that he was unable to recall whether Corbin had tried to induce petitioner to enter the illegal whiskey business. Moreover, he could not remember the year or month when they had allegedly visited petitioner (H. 24–26; 40–43). Key also contradicted the statements contained in Poindexter's affidavit (H. 9–10) by stating that Poindexter did know Corbin, and on one occasion had gone to petitioner's home with Corbin (H. 46; 51–54). At the conclusion of the hearing, the district court judge ruled that petitioner had not presented "newly discovered" evidence; that petitioner's evidence was not helpful to him; and that there was no evidence of suppression of the facts on the part of the government (H. 62–68).

ARGUMENT

Although the court of appeals opinion is based on petitioner's failure to exercise due diligence in discovering the allegedly new evidence and on such basis is entirely sound, a more basic reason for denying the motion for a new trial exists. We submit that, as shown at the hearing, no new evidence favorable to petitioner ever in fact existed. Key's testimony at the hearing was consistent with the version of events at trial given by agent Corbin. In this light, petitioner's claim that the prosecutor was "negligent" in failing to apprise himself of the assertedly exculpatory testimony of Key and Poindexter and to disclose their names to the defense is entirely unfounded.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970